State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL
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Peter F. Kilmartin, Attorney General

June 20, 2013
OM 13-18

Mr. Edward Balbat

Ms. Christina Holden-Shea

RE: Balbat v. Westerly Housing Authority Board of Commissioners
Holden-Shea v. Westerly Housing Authority Board of Commissioners

Dear Mr. Balbat and Ms. Holden-Shea:

The investigations into your Open Meetings Act ("OMA") complaints filed against the Westerly Housing Authority Board of Commissioners ("Board") are complete. By two separate correspondences you each allege the Board violated the OMA during its February 21, 2013 special meeting when the agenda failed to include a statement specifying the nature of the business to be discussed. You additionally allege the agenda failed to indicate that the Board intended to convene into executive session. Because this Department considers your OMA complaints to be identical, we will address both of your complaints within this single finding.

In response to your complaint, we received a substantive response from the Board's legal counsel, George A. Comolli, Esquire. Attorney Comolli states, in pertinent part:

> "The Westerly Housing Authority is [ ] in the process of selecting a new Executive Director which has become an issue of great public interest. * * *
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> The February 21, 2013 meeting was posted, however, it was not posted noting that it would be an Executive Session pursuant to Rhode Island General Law 42-46-5 as required, to discuss specific contract terms and the character of one of the proposed candidates, who requested his name remain in confidence. * * * At that meeting, the Board entertained a motion to go into Executive Session and at

> the Executive Session no action was taken and we reported out of Committee that no action was taken and the meeting was scheduled for the next regularly scheduled meeting for March 12, 2013.[1]
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> * * *
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> We are scheduling our next meeting to discuss all candidates to the Westerly Housing Authority for March 25, 2013. Two of said candidates have asked that their applications, character and job qualifications be handled in confidence, however, the meeting will be open to the public until such time as they interview those two candidates, at their request."

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Board violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The first issue for this Department to decide is whether the agenda item for the February 21, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed. The agenda item at issue for the February 21, 2013 meeting stated, in pertinent part:

> "Discuss Contract for new Executive Director"

The OMA requires that:

> "Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed." R.I. Gen. Laws § 42-46-6(b).

The Rhode Island Supreme Court examined this requirement in Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), wherein the Court held that the agenda must provide sufficient information to the public so that the citizenry may be informed as to what matters will be addressed at a meeting and the agenda must not be misleading. Id. at 797-98. The Court determined the appropriate inquiry is "whether the [public] notice provided by the [public body]

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[1] Pursuant to this Department's request, legal counsel for the Board provided a copy of the sealed executive session minutes for this Department's in camera review.

fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted." Id. at 797.

The Rhode Island Supreme Court, on April 2, 2013, re-examined the Tanner standard in Anolik v. Zoning Board of Review of the City of Newport, 2012-76-APPEAL, 2013 WL 1314947 (R.I., Apr. 2, 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel's property that had been approved by a previous zoning board decision. Id. at 2. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

> "IV. Communications:
> Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel"

At the meeting, the board voted unanimously to approve the request for an extension of time which required that the "improvements must be started and [be] substantially complete [by] February 23, 2011." Id. On August 21, 2009, the plaintiffs filed a complaint in Superior Court alleging that the agenda item violated the OMA because it was "a 'vague and indefinite' notice to the public and one lacking in specificity." Id. The Superior Court granted defendants' motion for summary judgment. Id. at 4. On appeal, the Supreme Court looked to Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the "public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon." Id. at 6-7 *quoting* Tanner, 880 A.2d at 797. The Court held that the agenda item was "completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or even an identifying petition or case number." Id. at 7. (Emphasis in original). The agenda item "fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration." Id. at 8.

In the instant case we conclude that the agenda item was sufficient to adequately inform the public of the nature of the business to be discussed. The agenda item informed the public that the Board was going to "[d]iscuss Contract for new Executive Director." Our review of the sealed executive session meeting minutes reveals that discussions concerning the agenda item did not veer off topic. You allege that the agenda item implied that an Executive Director had already been chosen. Respectfully, we do not believe this agenda item was misleading. Based upon the evidence presented, and applying the above case-by-case analysis, this Department opines that the item listed on the agenda at issue adequately advised the public as to the nature of the business to be discussed. Consistent with Anolik, the OMA requires a statement specifying the "nature" of the business to be discussed, not a verbatim list of every potential aspect that might be discussed in relation to that topic. See Gugliemo v. Scituate Town Council, OM 11-34 ("[W]e do not find the posted agenda deficient because it failed to list the size of the proposed

cemetery."). We conclude that the February 21, 2013 meeting agenda was proper and met the Anolik standard. As such, the Board did not violate the OMA.

We now turn to your allegation that the Board violated the OMA when the agenda for the February 21, 2013 meeting contained no provision "advising of the Board of Commissioners' intent to go into an Executive Session." The OMA does not specifically address the question of whether a public body must inform the public in advance as to whether a meeting will be held in open or closed session. See R.I. Gen. Laws § 42-46-6. The Rhode Island Superior Court has touched upon a similar issue. In Pine v. Charlestown Town Council, the Court stated that:

> "While the notice provision of the Act does not explicitly require a public body to give affirmative notice that a meeting will be open, inclusion of such a statement in a notice certainly would be prudent. At a minimum, however, the notice cannot state, in advance, that a meeting will be closed (unless that matter has been decided previously in an open meeting by open call and majority vote) and, at most, may indicate that the public body may seek at an open meeting to go into closed executive session for a stated purpose."

1997 WL 839926 at 9 (R.I.Super.) (Emphases added). Consequently, based upon the absence of an explicit requirement, we believe that the Board did not violate the OMA by failing to indicate that they intended to convene into executive session to discuss the contract of the executive director. In fact, "at most," the notice may indicate that the "public body may seek. . . to go into closed executive session."[2] Id. See also Tanner v. Town Council of East Greenwich, 880 A.2d 784, 796 (R.I. 2005). Accordingly, we find no violation.

Although this Department has found no violations, nothing within the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 42-46-8(c). The OMA allows the complainant to file a complaint within ninety (90) days from the date of the Attorney General's

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[2] Pine preceded the Supreme Court's opinion in Tanner wherein the Court explained that notice to a meeting must provide "fair notice to the public under the circumstances, or such notice, based on the totality of the circumstances, as would fairly inform the public of the nature of the business to be discussed or acted upon." Tanner, 880 A.2d at 796. Arguably, this notice could include whether a particular discussion would occur in executive session, but we read Tanner and the subsequent decision in Anolik as ensuring that the public be advised of "the nature of the business to be discussed or acted upon" and not whether such discussion would occur in open or closed session. See also R.I. Gen. Laws § 42-46-6(b) (notice must include a "statement specifying the nature of the business to be discussed"). Moreover, as observed in Pine, unless previously decided at a prior meeting, a public body does not know at a particular meeting that it will convene into executive session until a majority of the public body actually votes to convene into executive session and in the case of R.I. Gen. Laws §§ 42-46-5(a)(1) and (a)(8), the final determination whether to convene into executive session would be at the option of the affected person and not the public body.

closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. See id. Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: George A. Comolli Esq.